either by leakage of the vessel or by shipping water. The damage is thus shown to be caused by the dangers of navigation. It follows that the shipper must establish negligence or want of skill in the carrier." See also *Turner* v. *The Black Warrior*, 1 McA. 181; *N. J. Steamboat Co.* v. *Merchants' Bank*, 6 How. 344.

The instruction refused by the court below, in the principal case, that "*if the jury believe from the evidence that the loss of the coffee in controversy was within one of the exceptions* contained in the bill of lading—that is to say, if it was occasioned by perils of navigation of the lakes and rivers, *then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff*," was correct according to all the cases; for the point at which they diverge is *where on the evidence the jury may be in doubt whether the losswas within the exception or not.* (And it is just at this point that the burden of proof becomes important.) The judgment therefore was properly reversed for this error, but the Supreme Court must be considered as going to the full length and settling the rule in the federal courts, that where the carrier gives *sufficient evidence to justify the jury in inferring that the loss arose from an excepted cause*, though on the whole evidence the cause be left doubtful, there the burden of proof is on the plaintiff to establish negligence. This rule we think is to be regretted, as it is at variance with that established in the principal state courts.

J. T. M.

Supreme Court of Illinois.

THE PEOPLE EX REL. O'CONNEL *v.* TURNER.

An Act of the legislature creating a reform school, and providing for the summary commitment to it of children who are "destitute of proper parental care and growing up in mendicancy, ignorance, idleness, or vice," is unconstitutional, as it prescribes a virtual imprisonment without due process of law.

Besides the objection to the summary method of proceeding prescribed, such an act, so far as it restrains liberty for any cause except actual crime, is in violation of the Bill of Rights, which declares that all men have certain inherent rights, among which is liberty.

The rights of the state and of parents over children, stated and discussed by THORNTON, J.

THIS was a writ of *habeas corpus*, directed to the superintendent of the Reform School of the city of Chicago.

The first act, in relation to this "Reform School," is a part of the charter of the city of Chicago, approved February 13th 1863, and the second is entitled "An Act in reference to the Reform School of the City of Chicago," approved March 5th 1867. The first section establishes a school for the safe keeping, education, employment, and reformation of all children, between

the ages of six and sixteen years, who are destitute of proper parental care, and growing up in mendicancy, ignorance, idleness, or vice." Section four of the Act of 1867, provides that, "whenever any public magistrate or justice of the peace shall have brought before him any boy or girl, between the ages of six and sixteen years, who he has reason to believe is a vagrant, or is destitute of proper parental care, or is growing up in mendicancy, ignorance, idleness, or vice," he shall cause such boy or girl to be arrested, and together with the witnesses, taken before one of the judges of the Superior or Circuit Courts of Cook county. The judge is empowered to issue a summons or order in writing to the child's father, mother, guardian, or whosoever may have the care of the child, in the order named, and if there be none such, to any person, at his discretion, to appear, at the time and place mentioned, and show cause why the child should not be committed to the Reform School, and upon return of due service of the summons, an investigation shall be had. The section then directs, "if upon such examination, such judge shall be of opinion that said boy or girl is a proper subject for commitment to the Reform School, and that his or her moral welfare, and the good of society, require that he or she should be sent to said school for employment, instruction, and reformation, he shall so decide, and direct the clerk of the court of which he is judge, to make out a warrant of commitment to said Reform School, and such child shall thereupon be committed."

Section 9 of the Act of 1863, directs that all persons between six and sixteen years of age convicted of crime, punishable by fine or imprisonment, who in the opinion of the court would be proper subjects for commitment, shall be committed to said school.

Section 10 authorizes the confinement of the children, and that they "shall be kept, disciplined, instructed, employed, and governed," until they shall be reformed and discharged, or shall have arrived at the age of twenty-one years, and that the sole authority to discharge shall be in the Board of Guardians.

The facts were that the relator's son Daniel O'Connel, a boy of fourteen, was committed to the Reform School, under the provisions of the acts above quoted, by a warrant from one of the judges of the Superior Court, setting forth that the said Daniel had "been found by competent evidence to be a proper subject for commitment to the said Reform School, and whose moral

welfare and the good of society, require that he should be sent to said school for instruction, employment, and reformation." The only question raised was the power of the legislature to pass the acts under which the boy was committed to the school.

The opinion of the court was delivered by

THORNTON, J. (after stating the facts).—The warrant of commitment does not indicate that the arrest was made for a criminal offence. Hence, we conclude that it was issued, under the general grant of power to arrest and confine for misfortune. The contingencies enumerated, upon the happening of either of which, the power may be exercised, are vagrancy, destitution of proper parental care, mendicancy, ignorance, idleness, or vice. Upon proof of any one, the child is deprived of home and parents, and friends, and confined for more than half of an ordinary life. It is claimed that the law is administered for the moral welfare and intellectual improvement of the minor, and the good of society. From the record before us, we know nothing of the management. We are only informed, that a father desires the custody of his child, and that he is restrained of his liberty. Therefore, we can only look at the language of the law, and the power granted.

What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question. Scarcely any two agree; and when we consider the watchful supervision which is so unremitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land, who could not be proved, by two or more witnesses, to be in this sad condition. Ignorance, idleness, vice, are relative terms. Ignorance is always preferable to error; but at most, is only venial. It may be general, or it may be limited. Though it is sometimes said that "idleness is the parent of vice," yet the former may exist without the latter. It is strictly an abstinence from labor or employment. If the child perform all its duties to parents and society, the state has no right to compel it to labor. Vice is a very comprehensive term; acts, wholly innocent in the estimation of many good men, would, according to the code of ethics of others, show fearful depravity. What is the standard to be? What extent of enlightenment, what amount of industry, what degree of virtue will save from the threatened imprisonment?

In our solicitude to form youth for the duties of civil life, we should not forget the rights, which inhere both in parents and children. The principle of the absorption of the child in, and its complete subjection to the despotism of the state, is wholly inadmissible in the modern civilized world.

The parent has the right to the care, custody, and assistance of his child. The duty to maintain and protect it is a principle of natural law. He may even justify an assault and battery in the defence of his children, and uphold them in their lawsuits. Thus the law recognises the power of parental affections, and excuses acts, which, in the absence of such a relation, would be punished. Another branch of parental duty, strongly inculcated by writers on natural law, is the education of children. To aid in the performance of these duties, and enforce obedience, parents have authority over them. The municipal law should not disturb this relation, except for the strongest reasons. The ease with which it may be disrupted under the laws in question, the slight evidence required, and the informal mode of procedure, make them conflict with the natural right of the parent. Before any abridgment of the right, gross misconduct, or almost total unfitness, on the part of the parent, should be clearly proved. This power is an emanation from God, and every attempt to infringe upon it, except from dire necessity, should be resisted, in all well governed states. In this country, the hopes of the child, in respect to its education, and future advancement, are mainly dependent upon the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relation would not only tend to wither these motives to action, but necessarily in time, alienate the father's natural affections.

But even the power of the parent must be exercised with moderation. He may use correction and restraint, but in a reasonable manner. He has the right to enforce only such discipline as may be necessary to the discharge of his sacred trust, only moderate correction and temporary confinement. We are not governed by the twelve tables, which formed the Roman law. The fourth table gave fathers the power of life and death and of sale over their children.

In this age and country, such provisions would be atrocious.

If a father confined or imprisoned his child, for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms, against such monstrous inhumanity.

Can the state, as *parens patriæ*, exceed the power of the natural parent, except in punishing crime? These laws provide for the "safe keeping" of the child; they direct his "commitment," and only a "ticket of leave," or the uncontrolled discretion of a board of guardians, will permit the imprisoned boy, to breathe the pure air of heaven, outside his prison walls, and to feel the instincts of manhood, by contact with the busy world. The *mittimus* terms him "a proper subject for commitment," directs the superintendent to "take his body," and the sheriff endorses upon it, "executed by delivering the body of the within named prisoner." The confinement may be from one to fifteen years, according to the age of the child. Executive clemency cannot open prison doors, for no offence has been committed. The writ of habeas corpus, a writ for the security of liberty, can afford no relief, for the sovereign power of the state, as *parens patriæ*, has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression.

If, without crime, without the conviction of any offence, the children of the state are to be thus confined, for the "good of society," then society had better be reduced to its original elements, and free government acknowledged a failure. In cases of writs of *habeas corpus* to bring up infants, there are other rights beside the rights of the father. If improperly or illegally restrained, it is our duty *ex debito justitiæ* to liberate. The welfare and rights of the child are also to be considered. The disability of minors does not make slaves or criminals of them. They are entitled to legal rights, and are under legal liabilities. An implied contract for necessaries is binding on them. The only act, which they are under a legal incapacity to perform, is the appointment of an attorney. All their other acts are merely voidable or confirmable. They are liable for torts, and punishable for crime. Lord KENYON said, "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it, in a court of justice." Every child over ten years of age may be found guilty of crime. For robbery, burglary, or arson any minor may be sent to the penitentiary. Minors are bound to pay taxes for the support of the government, and constitute a part

of the militia, and are compelled to endure the hardships and privations of a soldier's life in defence of the constitution and the laws, and yet it is assumed that to them liberty is a mere chimera. It is something of which they may have dreamed, but have never enjoyed the fruition. Can we hold children responsible for crime; liable for their torts; impose onerous burdens upon them, and yet deprive them of the enjoyment of liberty without charge or conviction of crime? The bill of rights declares that "all men are by nature free and independent, and have certain inherent and inalienable rights, among which are life, liberty and the pursuit of happiness."

This language is not restrictive, it is broad and comprehensive, and declares a grand truth that "all men"—all people everywhere, have the inherent and inalienable right to liberty. Shall we say to the children of the state, you shall not enjoy this right, a right independent of all human laws and regulations? It is declared in the constitution, is higher than constitution and law, and should be held for ever sacred.

Even criminals cannot be convicted and imprisoned without due process of law—without a regular trial according to the course of the common law. Why should minors be imprisoned for misfortune? Destitution of proper parental care, ignorance, idleness, and vice are misfortunes—not crimes. In all criminal prosecutions against minors for grave and heinous offences, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury. All this must precede the final commitment to prison. Why should children, only guilty of misfortune, be deprived of liberty without "due process of law?" It cannot be said that in this case there is no imprisonment. This boy is deprived of a father's care, bereft of home influences, has no freedom of action, is committed for an uncertain time, is branded as a prisoner, made subject to the will of others, and thus feels that he is a slave.

Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations, and unfit him for the duties of manhood. Other means of a milder character, other influences of a more kindly nature, other laws less in restraint of liberty, would better accomplish the reformation of the depraved, and infringe less upon inalienable rights.

It is a grave responsibility to pronounce upon the acts of the legislative department. It is however the solemn duty of the

court to adjudge the law, and guard, when assailed, the liberty of the citizen. The constitution is the highest law; it commands and protects all. Its declaration of rights is an express limitation of legislative power, and as the laws under which the detention is had, are in conflict with its provisions, we must so declare.

It is therefore ordered that Daniel O'Connel be discharged from custody.

We fear both the profession, and the Supreme Court of the State of Illinois, may justly conclude that we are in our annotations devoting an unusual and unequal proportion of space to cases decided by that court. But we think no apology will be demanded on account of the publication of the case to which this note is appended. Unless we have greatly misconceived its scope and principles, it must be regarded as striking at the very root and life of one of the most favorite schemes of reform known to the present age; what is called in popular language, legislative moral reform and compulsory popular education. These are the foundation stones upon which a very large and influential portion of our people propose to erect an empire, superior both in character and power to any other, ancient or modern. These two cardinal principles, legislative moral reform and compulsory popular education, embrace both the religious and political element of all the best class, pecuniarily at least, of modern reformers. Whether in the long run, they will be able to maintain their ground, against all opposing elements, is a question of very difficult solution. This class of reformers will be likely, and as it seems to us, will be fairly entitled, to regard this case as a test one, striking a fatal blow at the very foundation of their entire superstructure. For, if education and moral reform cannot have the compulsory aid of government, the nature of man is so lethargic, and so much prone to evil, on the most favorable view, that these reformers will have small hope of ever being able to mould so vast an empire as this, composed of such diverse nationalities, and such discordant religious and political opinions, into one homogeneous compound of purity and perfection, which these men greatly desire. It is the strong arm of the civil law which these men have been so long invoking; and which they seemed, before this decision, so near attaining. We may not correctly estimate the true scope of this decision, but if we do, it involves all we have said, and much more.

We know there is a highly cultured and powerful class in our community, both in point of numbers and position, who have no views or feelings in common with the class of reformers just alluded to. This latter class do not hold, that the mere text-book training of the entire mass of the community from four years old and upwards, has any necessary tendency to produce either wisdom or virtue; but rather the contrary, in vain conceit and imperfect comprehension; and the attempt in all classes to handle things which are too high for them. And above all, this latter class hold, that all hopeful and reliable moral reforms must be looked for only in a high degree of religious faith and culture, from earliest infancy; and that this cannot be expected to come from the common schools, or the reform schools, or any other schools; but exclusively or mainly from family training, and from the authoritative teaching of the church and her ministers, in the daily discipline of a devout and holy life.

These two schools are becoming, in our country, year by year, more and more antagonistic; and this decision projects a fatal shaft, which has entered between the very joints of the harness of the most impregnable armor of the one first named; and so far as we can comprehend it, must, if maintainable, penetrate into the most vital parts of its most indispensable machinery. For if there is living power enough in those abstractions of the state constitutions, which have heretofore been regarded as mere "glittering generalities," to enable the courts to enforce them, against the enactments of the legislature, and thus declare that all men are not only created free and equal, but remain so, and may enjoy life and pursue happiness in their own way, provided they do not interfere with the freedom of other men in the pursuit of the same objects; then the opportunity to compel parents to send their children to the common schools, by means of "Truant Laws," such as we have in the highly advanced commonwealth of Massachusetts, will come to a speedy and most inglorious termination. Under this decision such advanced announcements as the following from a Boston daily paper, will lose their interest and brilliancy, and be more a cause of shame than of pride.[1]

We have no disposition and no space here to enter into any extended discussion of the abstract right of government to compel all parents to submit their children to such education as the state judges most useful and necessary to make good citizens; or to compel such parents to keep their children employed so as not to come within the terms of the charter of the city of Chicago, "as being destitute of proper parental care, and growing up in mendicancy, ignorance, idleness, or vice." It seems by this statute, that if any child between the ages of six and sixteen years, comes within any one of these offences, he thereby forfeits his liberty, his home, and all the comforts of life, and becomes subject to an imprisonment of not exceeding fifteen years in a Reform school, which is indeed but another name for the Penitentiary. The mode of trial, too, certainly did not come within the rules of the great English charter of the liberty of the subject. There was no indictment, no formal information, no jury, no trial, and nothing indeed but the *sentence*, which must be regarded as highly summary.

We have read this decision with great admiration. There can be no question, it is a very creditable advance in favor of liberty, among the children of white parents, as well as those of a more sombre hue. All classes of men, and women too, under this decision, may keep their own children at home, and educate them in their own way. This is a very wonderful advance in the way of liberty. It must certainly be a great comfort to a devout Roman Catholic father or mother, to reflect, that now his child cannot be driven into a Protestant school, and made to read the Protestant version of the Holy Scriptures. And what is more, his or her child cannot be torn from home and immured in a Protestant

1 "CHELSEA MATTERS.—Chelsea appears to be ahead as regards compulsory education. A special truant officer was appointed by the Mayor a few days since. Last week the pupils of the public schools were directed by the teachers to give their names and residences to the officer. On Thursday the School Committee adopted an order providing that when any pupil shall without satisfactory excuse absent himself from school six half-days any one term, the teacher shall report him to the truant officer, who shall take him into custody and bring him before a member or members of the School Committee."

This certainly seems to partake very largely of the military educational system of the Prussian empire, and to the common mind evinces very little of the inalienable right to the enjoyment of life, and the unfettered pursuit of happiness.

prison, for ten or more years, and trained in what he regards a heretical and deadly faith, to the destruction of his own soul. This is right; and we hope the court will be able to maintain this noble stand upon first principles.

But how will these reformers view it? Will they tamely submit to be shorn of all their glory by the judiciary? These reformers swear, as we had supposed, mainly by the omnipotence of the legislature; and so long as they have that in their own power there is no embarrassment in the way of their advancement. They can teach their own children at home, or in private schools; but the common schools are for the children of the poor; and the Reform schools for those without *proper* parental control. Now we fear that these men will ask the Supreme Court of Illinois some questions in regard to the right of the state to maintain schools, and to compel children to submit to be schooled therein, that it will be somewhat embarrassing to answer in a manner satisfactory to the interrogators.

We have no evil will towards reformers of any class. The love of reform comes always from the best of purposes; from a desire to have others participate in the beauty and excellence which we have found for ourselves. But we cannot disguise the fact, as we look back, across the dark tract of the ages, that reformers, in all times and in all countries, invoke the aid of force and compulsion, in some form. They sincerely believe themselves entitled to exercise the strong arm of the law, in order to bring about some greater good, or in some shorter period, than could otherwise be accomplished. The time for the resort to the fagot or the gibbet, or the rack or the wheel, has indeed passed away; at which all rejoice. But in doing so, we are in danger of forgetting, that those who invented and exercised these engines of reform were animated by the same spirit as ourselves—the doing of good to those who were too ignorant or too perverse willingly to accept their highest good at our hands. And in all times the subjects of such compulsory reforms are prone to regard the reformers in too offensive a light, and to give them the undeserved name of priests or puritans, or some other offensive epithet.

But we believe the reformers of all ages have been mainly well intentioned men, who had the highest good of the greatest number deeply at heart. We cannot believe that the Holy Inquisition, or the fires of Smithfield and Oxford, in our own mother country, with all their loathsome horrors, proceeded mainly from the love of oppression or of vengeance. And we are disposed to accept the same charitable construction in regard to the compulsory attendance upon the common schools, and the compulsory reading of the Protestant Bible in such schools, and especially in regard to these Reform schools, which are springing up in every section of our widely extended country.

We do not indeed suppose that the persons mainly instrumental in getting up these things in the country really intend them for their own children, or indeed in the present case for the children of Protestant parents, to any large extent. We cannot disguise to ourselves that these things do have an ominous squint towards the children of Roman Catholic parents, and of the multitudes of poor emigrants yearly coming to our shores, most of whom are of that faith. We cannot but feel that the real animus of these enactments is but poorly disguised under the general terms adopted; just as we should say of any similar provisions now adopted by state legislatures at the South, especially when done in defiance of the authority of the national government. All would exclaim that it was a mere cloak for the reinstating

of slavery for a limited term among the children of the colored population. We all very properly look to the natural operation of such provisions, and the persons they will naturally reach, in order to determine the motive of those who introduce them. There is nothing unequal or unjust in this construction of such enactments. And if this were their only purpose there could be no question they deserve the treatment they receive in the principal case. Reform schools or common schools for the leading purpose of training Roman Catholic children in the fundamental principles of Protestantism by compulsion, so far as the compulsion is concerned, surely could not be defended upon any principles of jurisprudence known to free countries. But there is a secondary purpose upon which a large portion of the most agitating, if not the most dangerous and offensive legislation of the country is sought to be rendered acceptable to the people, and thus maintained in order to enable it to accomplish some great good as it were by indirection. This mode of doing good even, is always offensive and never to be vindicated except upon the clearest certainty, that it really is indispensable to the accomplishment of some great necessity for the public good. Interested parties will always see this great public good with great clearness of vision and will refuse to accept the conviction of any of the alleged evil consequences. And as the good is often certain and the evil only conjectural, such legislation has much to commend it, and especially to those who feel reasonably sure they can themselves contrive to keep clear of all injury and possibly compass some good by means of it. It is thus that many burdensome restrictions upon trade come to be endured for the sake of some fancied general benefit, and a sure private and particular benefit in the shape of monopoly or some other form to the few, who are most active in getting up such schemes.

And the same is true of all restrictive legislation of the character of compulsory education or reforms of any kind, they look very plausible, on the outside, inasmuch as they profess to cure ignorance, idleness and vice—infirmities and evils highly detrimental always, and in certain proportions of combination in the elements of public life, destructive of the common welfare. In this latter view there can be no question of the right to apply such legislative remedy or even punishment as the nature of the case may demand. But the mere reform and advancement of the citizen in virtue or learning, except as an incident of punishment for crime, cannot, in free government, be made a leading object of compulsory legislative discipline. And this case seems to us to come very nearly upon the exact line of demarcation between these two widely divergent fields of employment. We rejoice greatly, as we believe all true friends of liberty and constitutional government will, at this demonstration of the highest judicial tribunal of one of the great northwestern states, in what we cannot but regard as the right direction. We bid them God speed in a great and good work; but one of great delicacy and difficulty. The particular case seems to be measurably free from doubt. But there is a wide field of debatable ground between the dominion of punishment for crime and that of mere improved culture, in which it will be long before any very exact definitions of jurisdiction or of the distributions of service between the voluntary and the compulsory fields can be satisfactorily fixed. In the mean time the present decision cannot but be regarded as a salutary warning and admonition to those reformers, who believe the legislative authority abundant to compel every citizen to accept their own faith and practice—for the best of all reasons—that nothing could be so healthful for his soul's most salutary discipline. I. F. R.